Supreme Court, U.S.
FILED
APR 30 1997
CLERK

No. 96-1531

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

W. DAVID LEAK, M.D. AND PAIN CONTROL CONSULTANTS, INC. *Petitioners,*

against

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D.; AND PAUL ADDESSI, M.D. *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS GRANT ANESTHESIA ASSOCIATES, INC., DRS. HIGHLY, BARUA, EDWARDS, MCKAY, KIM, ROH, LOGAN, PRESTON, AND GETZ'S BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

Petitioner W. David Leak, M.D. ("Dr. Leak") and his professional corporation, Pain Control Consultants, Inc. ("PCC") provide medical management services for acute and chronic pain in the Columbus, Ohio area. Respondent Grant Medical Center ("Grant") has entered into an exclusive contract for anesthesia and pain control services with Respondent Grant Anesthesia Associates, Inc. ("GAA") Dr. Leak is not an employee of GAA and is not eligible for privileges at Grant for pain control services.

Petitioners brought this antitrust action alleging that they are unable to compete in the market for pain control services because certain managed care plans designate Respondent Grant as a participating hospital but do not designate the hospitals where Dr. Leak has privileges.

Dr. Leak has staff privileges at two Columbus hospitals, which according to Dr. Leak's evidence in his Opposition to Respondents' Motion for Summary Judgment, are contracted as service providers for patients of at least seven managed care plans and three traditional indemnity insurance plans. Petitioners did not

join any managed care plans as parties to this action.

All Respondents filed motions for summary judgment on the basis that Dr. Leak and his professional corporation did not have standing to sustain a private antitrust claim. Before ruling on the motions, the trial court granted an additional seven months for Petitioners to conduct discovery on the standing issue.

II. REASONS FOR DENYING THE WRIT

A. NO CONFLICT OF LAW EXISTS AMONG THE CIRCUITS

Petitioners have alleged a conflict of law among the circuit courts regarding the test for antitrust standing. In order to create the alleged conflict, Petitioners center their attention on non-substantive differences in the circuit court decisions rather than on the meaning of antitrust standing.

Petitioners argue that the purported conflict is caused by inconsistent application of the requirements set forth in Associated General Contractors of California, Inc. v. California State Council of Carpenters, et.al., 459 U.S. 519 (1983). Associated Gen. Contractors holds that an antitrust plaintiff must plead and prove both antitrust injury and antitrust standing. Antitrust injury is the

constitutional prerequisite of an actual case or controversy. However, meeting the constitutional standing requirement alone is not sufficient for an injured party to be an appropriate person to bring an antitrust action.

In Associated Gen. Contractors, this Court did not review the plaintiff-union's constitutional case or controversy standing requirement of "antitrust injury," the initial prong of the test. The injury was well-plead and assumed from the case's posture as an appeal from an order of dismissal under F.R.C.P. 12.

Therefore, the sole consideration in Associated Gen. Contractors was whether the plaintiffs had met the second prong of the test, "antitrust standing." The Court's inquiry looked to whether plaintiffs were "proper part[ies] to bring a private antitrust action." Id. at 535 n.31.

The Court held that analysis of several additional factors was necessary under the second prong of the antitrust standing test. These factors focused on the nature of the injury, character of the relationship between the violation and the injury, potential for duplicative recovery or complex apportionment of damages, and

whether there existed more direct victims of the alleged violation. The analysis of these additional factors form the core of current antitrust standing inquiry to discern whether an injured person is a proper party to prosecute a private antitrust claim. Id.

The Circuit Courts have consistently applied the Associated Gen. Contractors antitrust standing analysis. The only differentiation in application of the test in the cases cited by Petitioners is whether antitrust injury is considered as a part of antitrust standing analysis or as a separate, preliminary requirement. In either case, antitrust injury is required.

Petitioners cite Balaklaw v. Lovell, 14 F.3d 793 (2nd Cir. 1994) and Walker v. U-Haul Co. of Mississippi, 734 F.2d 1068 (5th Cir. 1984), as representative of two-pronged standing analysis. The Balaklaw court held "[a]s a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that questions is yes, they must then determine whether any of the [Associated Gen. Contractors] factors . . . prevent the plaintiff from being an efficient enforcer of the antitrust laws." Id. at n.9. The term "efficient enforcer" has become the nomenclature

for the second prong "antitrust standing" analysis required by Associated Gen. Contractors.

Balaklaw was before the Circuit Court on a motion for summary judgment. The Circuit Court concluded as a matter of law that there was no antitrust injury and the requirement of the first prong was not met. Therefore, the Circuit Court never considered the Associated Gen. Contractors' factors analysis of efficient enforcer. However, the Balaklaw court referenced the Associated Gen. Contractors factor analysis stating that "in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury". Balaklaw at 797.

Walker, like Balaklaw, was decided on a motion for summary judgment. The Walker court recognized, as Associate Gen. Contractors requires, that proof of both antitrust injury and antitrust standing were essential prerequisites to recovery on an antitrust claim. Walker at 1073. The Circuit Court, affirming summary judgment, found that the plaintiff had not raised any genuine issue of material fact "regarding. . .[defendant's] claimed

antitrust violation." Id. at 1074.

Having concluded that the defendant failed to sustain the first prong of the analysis, the Walker court had no opportunity to consider the Associated Gen. Contractors second prong antitrust standing factors stating "standing defines the plaintiff's right to sue and the existence of injury is a component of the substantive right." Walker at 1073.

Petitioners contrast the two-prong analysis of Balaklaw and Walker with an alleged substantively different "multifactor" analysis found in Bodie-Rickett and Assocs. v. Mars, Inc., 957 F.2d 287 (6th Cir. 1992) and Greater Rockford Energy and Technology Corp. v. Shell Oil Co., 998 F.2d 391 (7th Cir. 1992). Bodie-Rickett identified five factors "on which the standing issue turns . . . ." citing Southhaven Land Company v. Malone and Hyde, Inc., 715 F.2d 1079 (6th Cir.1983) where the Sixth Circuit first applied the Associated Gen. Contractors factor analysis. Bodie-Rickett at 290.

Greater Rockford after review of the purported discord in antitrust standing analysis, found the distinctions as "merely a matter of semantics and the essential elements of the [Clayton Act] §4

action remain the same under either approach." Id. at 391 n. 7.

In support of their conclusion that these two lines of cases conflict, Petitioners reference only to Todorov v. DCH Healthcare Authority, 921 F.2d 1438 (11th Cir. 1991). Despite the Circuit Court's statement in Todorov that "antitrust standing has become somewhat confused," Id. at 1449, Todorov ascribes to a two-pronged approach: "First, the court should determine whether the plaintiff suffered an 'antitrust injury'; second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury." Id. The commentary on "directness or remoteness" is a direct reference to the Associated Gen. Contractors antitrust standing factors.

Courts that describe their analysis as two-pronged first determine whether the plaintiff has suffered an antitrust injury and then proceed to apply the Associated Gen. Contractors factors to determine whether that injured person has antitrust standing. Courts that describe their antitrust standing analysis as multipart also first determine whether the plaintiff has suffered an antitrust injury and

then go on to apply the Associated Gen. Contractors factors. The only difference between the two lines of cases is that the first treats antitrust injury as a separate inquiry, while the second treats antitrust injury within the antitrust standing factor analysis. There is no substantive difference.

Petitioners also argue that the decision below is in "direct conflict" with Summit Health, LTD v. Pinhas, 500 U.S. 322 (1991). Petition at 16-17. However, no conflict exists between the decision below and Summit Health. Summit Health addressed the nexus between the denial of clinical privileges to one physician and the jurisdictional requirement for an effect on interstate commerce.

There is no conflict among the circuits on antitrust standing analysis or application.

B. THE PETITIONERS RAISE OTHER ISSUES NOT APPROPRIATE FOR REVIEW BY THIS COURT IN THIS CASE.

Petitioners allege an improper inference was drawn in the decision below on motion for summary judgment. Petitioners argue that the inference that Dr. Leak is fully able to compete in the market for pain control services because he holds privileges at two

hospitals other than Grant was erroneous. Dr. Leak argues that this inference was improper because it was allegedly drawn against him, which is not permitted in summary judgment proceedings.

The trial court followed the well-settled rule that inferences drawn from evidence presented in summary judgement proceedings must be construed in favor of the party opposing the motion. United States v. Diebold, 369 U.S. 654, 655 (1962). In its decision, the court citing Adickes v. S. H. Kress and Co., 398 U.S. 144, 157 (1970) stated that "[t]he evidence must be viewed in the light most favorable to the nonmoving party." Appendix at 6.

Dr. Leak's affidavit was the only evidence before the Court on Petitioners' ability to compete. Dr. Leak submitted information on seven managed care plans and three traditional insurance plans which designate the facilities where Dr. Leak has privileges as participating hospitals. On the record before it, the trial court found as a matter of law that Dr. Leak was not foreclosed from competing.

Petitioners argue that managed care and insurance companies restrict competition for patients in plans that designate any hospital

other than those two where Dr. Leak has privileges as participating hospitals. Yet, Petitioners did not to join any managed care plans as parties to this action.

Instead Petitioners allege that the exclusive contract between Grant and GAA is an unlawful tying arrangement and a group boycott fostered by the managed care plans. This is an inappropriate case to attempt to determine whether the intersection of exclusive hospital contracts and managed care amounts to an antitrust violation for which Petitioners have standing to sue.

III. CONCLUSION

The petition for a writ of certiorari should be denied because the law among the circuit courts in regard to the test for antitrust standing is not in conflict.

Respectfully Submitted,

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